Supreme Court, U.S.
FILED
DEC 18 2003

No. 03-895

In the

Supreme Court of the United States

WALTER ROSALES, MARIE TOGGERY, and KAREN TOGGERY,

Petitioners,

v.

UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, and NATIONAL INDIAN GAMING COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Patrick D. Webb, Esq.
Counsel of Record
WEBB & CAREY
401 B Street
Suite 306
San Diego, CA 92101
(619) 236-1650
Attorneys for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

Whether a federally recognized Indian tribe is a necessary and indispensable party to an action by individual Indians to enforce their allotments of non-tribal land pursuant to 25 U.S.C. 345.

Whether individual Indians can be deprived of all rights and remedies provided by 25 U.S.C. 345, when a subsequently recognized Indian tribe falsely claims sovereignty over non-tribal land allotted to the individual Indians.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

Introduction 1

Procedural History 3

Statement of Facts 5

REASONS FOR GRANTING WRIT 10

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS 10

II. CONCLUSION 19

APPENDIX

Circuit Court Order (8/11/03) 1a

District Court Order (4/22/02) 5a

Order Denying Rehearing 18a

Constitutional and Statutory Provisions 19a

TABLE OF AUTHORITIES

CASES

ANTOINE V. UNITED STATES ("ANTOINE"), 637 F.2D 1177, 1181-82 (8TH CIR. 1981), 637 F.2D 1177, 1181-82 (8TH CIR. 1981) 10, 11, 12, 17,18

CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLA. V. COLLIER ("POTAWATOMI"),17 F.3D 1292, 1294 (10TH CIR. 1994), 17 F.3D 1292, 1294 (10TH CIR. 1994) ..... *passim*

CONFEDERATED SALISH AND KOOTENAI TRIBES V. UNITED STATES, 401 F.2D 785 (CT. CL. 1968), CERT. DENIED, 393 U.S. 1055 (1969) 18

DAVIS V. UNITED STATES 192 F.3D 951, 958-59 (10TH CIR. 1999) 11, 16, 17

KANSAS V. NORTON, 249 F.3D 1213, 1226-27 (10TH CIR. 2001) 16

KESCOLI V. BABBITT, 101 F.3D 1304, 1311 (9TH CIR. 1996) 17

PIT RIVER HOME AND AGRIC. COOP. ASS'N V. UNITED STATES, 30 F.3D 1088 (9TH CIR. 1994) 15

RISHELL V. JANE PHILLIPS EPISCOPAL MEM'L MED. CTR., 94 F.3D 1407, 1413 (10TH CIR. 1996) 17

SAC AND FOX V. NORTON, 240 F.3D 1250, 1260 (10TH CIR. 2001) 17

SHERMOEN V. UNITED STATES, 982 F.2D 1312, 1318 (9TH CIR. 1992) 11, 16

TEMPLE V. SYNTHES CORPORATION, LTD., 498 U.S. 5, 8 (1990) 20

UNITED STATES V. CREEK NATION, 295 U.S. 103, 111 (1935) 18

UNITED STATES V. KLAMATH AND MOADOC TRIBES, 304 U.S. 119 (1938) 18

UNITED STATES V. STATE TAX COMM., 535 F.2D 300, 304 (5TH CIR.1976) 6

YELLOWSTONE COUNTY V. PEASE, 96 F.3D 1169, 1172 (9TH CIR. 1996) 11

ZASLOW V. KROENERT, 29 CAL.2D 541, 548 (1946) 8

Statutes and Other Authorities

25 U.S.C. 345 ..... *passim*

25 U.S.C. 348 6

25 U.S.C. 461 ..... 2, 5

25 U.S.C. 465 ..... 3, 6, 7, 13

25 U.S.C. 476 ..... 7, 11

28 U.S.C. 1254 1

Cal. Civil Code 685-86 8

Fifth Amendment, U.S. Const. amend. V 1, 18

17 Stat. 159 (1872) 13

25 C.F.R. 151.8 14

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, filed August 11, 2003, is set forth in the Appendix ("App.") pp. 1a-5a. The opinion of the United States District Court for the Southern District of California, filed April 22, 2002, is set forth in the Appendix at pp. 5a-17a.

JURISDICTION

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Ninth Circuit denied the Petitioners' Petition for Rehearing on September 19, 2003. App. p. 18a. This Petition was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth Amendment, U.S. Const. amend. V, actions for allotments pursuant to 25 U.S.C. 345, and Rule 19 of the Federal Rules of Civil Procedure, the relevant portions of which are set forth verbatim at App. pp. 19a-22a.

STATEMENT OF THE CASE

Introduction

The United States has allowed a false claim of sovereignty by a recently created, non-historical, reorganized Indian tribe to deprive the individual

Indian Petitioners of all rights and remedies to enforce their allotments in trust Parcel 597-080-01, pursuant to 25 U.S.C. 345.

The Ninth Circuit court of appeals decision in this case, erroneously found the Jamul Indian Village to be a necessary and indispensable party to this action, and thereby denied Petitioners' all rights and remedies to enforce their allotments in trust Parcel 597-080-01, pursuant to 25 U.S.C. 345.

The Ninth Circuit's decision in this case conflicts with long standing precedent in the Eighth and Tenth Circuits, and denies individual Indian owners of millions of acres of allotted land in the nine western states the remedies to enforce their allotments provided in 25 U.S.C. 345. Here, the Ninth Circuit is alone among the circuit courts of appeals in erroneously holding that a federally recognized tribe is a necessary and indispensable party to an action to enforce individual Indians' allotments under 25 U.S.C. 345, requiring dismissal of the individual Indians' claims due to the tribe's sovereign immunity. Such a disparity in outcome, based upon in which circuit the allotment was made, has not been, and cannot be, justified.

While the general practice of allotting reservation land to individual Indians ceased with the passage of the Indian Reorganization Act of 1934 ("I.R.A.") 25 U.S.C. 461, the United States concedes that more than 90 million acres of America have been "allotted" to Indians since passage of the General Allotment Act of 1887. Felix Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, Sec. B1, p.614. Moreover, the United States continues to accept

individual gifts of land from private citizens, as here, in trust for the benefit of designated individual Indian "allottees," pursuant to the Indian Reorganization Act. 25 U.S.C. 465. Felix Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 1, Sec. D4, p.41, n. 118. Some of the more well known allotments in Southern California that have been before this Court include those in and around Palm Springs, involving individual members of the Cabazon, Augustine, Torres-Martinez and Agua Caliente Bands of Mission Indians. Felix Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, Sec. B1, p.614, n. 20.

Certiorari should be granted in this case to eliminate the conflict among the circuit courts of appeals, and to decide important questions of federal Indian law that have not been, but should be, settled by this Court to prevent false claims of sovereignty from taking individual Indian allotments without just compensation. Without this Court's intervention, thousands of Native Americans with millions of acres of land in the nine western states of the Ninth Circuit will continue to be deprived of the remedies Congress provided in 25 U.S.C. 345.

Procedural History

Petitioner's Complaint was filed on May 30, 2001. Respondents moved to dismiss pursuant to Fed. R. Civ. P. 8(a) and 12(b)(6), which motion was denied by the District Court for So. California on October 15, 2001. An Answer was filed on behalf of the Respondents on November 1, 2001.

Respondents again moved to dismiss, or in the alternative, for judgment on the pleadings and summary judgment on November 9, 2001, alleging that there was no ripe case or controversy, Petitioners lacked standing, and Petitioners had failed to exhaust administrative remedies.

On February 14, 2002, the District Court for So. California granted the Respondents' motion for summary judgment, and denied the Respondents' motions to dismiss and for judgment on the pleadings.

Petitioners moved for new trial, or in the alternative, relief from judgment on February 22, 2002. The District Court for So. California construed Petitioner's motion for a new trial as a motion for reconsideration, and then denied Petitioners' motion for reconsideration, on April 22, 2002. App. at pp.5a-17a.

Petitioners timely filed a notice of appeal of the District Court's order granting summary judgment, and denying Petitioners' motion for new trial and relief from judgment, which had been construed as a motion for reconsideration, on May 10, 2002. The United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision in an unpublished Memorandum Decision on August 11, 2003. App. pp.1a-4a.

Petitioners timely filed a motion for rehearing, which was denied by the United States Court of Appeals for the Ninth Circuit on September 19, 2003. App. p.18a. This petition was timely filed on December 18, 2003.

Statement of Facts

Petitioners, Walter Rosales, Marie Toggery, and Karen Toggery, are Indians with half or more degree of California Indian blood, and are enrolled members of the Jamul Indian Village, a tribal governmental entity of Kumeyaay Indians, recognized by Congress in 1981, governed by a constitution adopted pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq., and located in Jamul, California.[1]

On September 26, 1912, J.D. Spreckel's Coronado Beach Company deeded 2.21 acres of land in Jamul, California, to the Roman Catholic Bishop of Monterey and Los Angeles, "to be used for the purposes of an Indian graveyard and approach thereto." Petitioners and their families were, from their birth, occupants by sufferance, in possession of certain private property, contiguous to that Indian graveyard, which was owned by the non-Indian Daley family.

During the latter part of the 1970's the Petitioners and their families negotiated a gift of the property that they possessed. The Daleys agreed to convey title to the land to the United States in trust for the explicit benefit of those half-blood Jamul Indians then occupying the property. The Daleys used this form of conveyance to provide a place for the Petitioners and their families to live in perpetuity, protected by the United States, as a trustee, against all forms of

---

[1] Marie Toggery died during the pendency of this dispute. Her surviving claims are now being prosecuted by the representative of her estate, Karen Toggery.

alienation, trespass and infringement.

On December 27, 1978, the Daleys, recorded a grant deed of parcel 597-080-01, consisting of approximately 4.66 acres, to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." However, upon the recording of the grant deed, the United States failed to issue trust patents to the individual beneficiaries of that deed, as provided for in 25 U.S.C. 348.

Instead, in the absence of specifically prescribed designation procedures, the Secretary of the Interior designated the Petitioners, among other half blood Jamul Indians, as beneficiaries of trust Parcel 597-080-01, by locating them on the property, acquiescing in their continued presence, possession and use of Parcel 597-080-01 for 25 years, building houses for them on the Parcel, and providing the Petitioners with services usually accorded Indians who have been designated beneficiaries of land acquired and held in trust for individual Indians under 25 U.S.C. 465.

Similar forms of grant deeds have long been accepted by the BIA and similar designations of individual Indians' trust allotments have long been made by the BIA, and enforced by the courts. See, *Coast Indian Community v. U.S. ("Coast")*, 550 F.2d 639, 651, n32 (Fed. Cl. 1977); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir.1976); and Memoranda of the Solicitor of the Interior, reprinted in 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-74 ("Mem. Sol. Int.") at 668, 724, 747, and 1479, involving for e.g., the

Mississippi Choctaws, the St. Croix Chippewas, the Nahma and Beaver Indians, and the Nooksack Indians.

The grant deed was recorded on December 27, 1978, three years before Congress recognized the creation of the tribe known as the Jamul Indian Village in 1981. This deed was accepted by the United States, pursuant to 25 U.S.C. 465, on behalf of the individual Jamul Indians of one-half or more Indian blood, who were then in possession of the parcel. The Petitioners thereby became entitled to this allotment of land under 25 U.S.C. 465, and 25 U.S.C. 345.

On May 9, 1981, Petitioner Watler Rosales certified that sixteen of twenty three registered voters adopted the Jamul Indian Village constitution, pursuant to the Indian Reorganization Act of 1934. 25 U.S.C. 476. The United States acknowledged the adoption of the constitution on July 7, 1981, and Congress recognized the Jamul Indian Village by publication in the Federal Register on November 24, 1982. When the Jamul Indian Village was created on May 9, 1981, it was a landless governmental entity.

The United States has confirmed that Parcel 597-080-01 was accepted into trust on behalf of individual Indians, including the Petitioners, and not on behalf of any then recognized, or any subsequently recognized, Indian tribe. The United States' August 3, 2000 response to Petitioners' Freedom of Information Act ("FOIA") request, contains a May 9, 2000 memo from Carmen Facio of the Pacific Regional office of the BIA to Nancy Pierskalla and George Skibine of BIA in Washington, D.C., stating that the: "[c]urrent trust parcel was accepted into trust in 1978 for Jamul Indians

of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village."

There is no subsequent record of any transfer of Parcel 597-080-01, from the United States' trust on behalf of the individual half-blood Jamul Indians designated by the Secretary, to any tribe, including the Jamul Indian Village.

All individual designated allotment beneficiaries of land held in trust by the United States are cotenants. Cohen, Handbook of Federal Indian Law (DOI 1982) Ch. 11, B3, pp.615-16. As such, cotenants have equal rights to possession, and no single cotenant has the right to exclude any other cotenant from the property. Cal. Civil Code 685-86; *Zaslow v. Kroenert*, 29 Cal.2d 541, 548 (1946). Therefore, all of the individual cotenants must consent to any transfer of their interest in the trust parcel to any subsequently recognized tribe.

Here, there is no evidence of any consent by the Petitioners to such a transfer. Nor is there any wonder why the Petitioners have never consented to such a transfer of their individual interests to the subsequently created tribe. The Interior Board of Indian Appeals has found non-members illegally participating in the Jamul Indian Village tribal government since the tribe was first recognized. 32 IBIA 166.

The Solicitor of the Interior specifically advises the field personnel of the BIA that any transfer of individual Indians' designated trust allotments must

still be accomplished the old-fashioned way, by recording a grant deed. 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-74 ("Mem. Sol. Int.") at 668, 724, 747, and 1479. Where, as here, no subsequent grant deed was recorded, the Petitioners' designated allotments in the trust property cannot have been transferred to any subsequently recognized tribe.

On or about February 5, 2001, the United States published a notice calling for the "razing" of the Petitioners' homes on their allotments in parcel 597-080-01, and their "displacement" from their allotment in parcel 597-080-01. Publishing the February 5, 2001 notice has, both denied, and excluded, the Petitioners from the quiet enjoyment of their allotments as designated beneficiaries of the trust Parcel 597-080-01. The United States' denial of Petitioners' entitlement, and exclusion from their allotment of land, has caused the Petitioners severe property damage, consequential damages, physical and bodily injury, including severe emotional distress, subject to proof at trial.

Petitioners are entitled to enjoin the alienation of their allotments, and prohibit the razing of their homes on their allotments, because the United States has admitted that parcel 597-080-01 is not land over which an Indian tribe exercises governmental power, since it was deeded to the U.S. in trust for certain individual Indians, including the Petitioners, and was not deeded in trust for any recognized Indian tribe, then in existence, or subsequently recognized by Congress. By virtue of their allotments in, and designation as beneficiaries of, the trust parcel, the Petitioners possess fee simple property rights in parcel

597-080-01, as against all others, save the United States. These usufructuary rights entitle the Petitioners to exclude all others, including the subsequently created tribe and those that seek to trespass upon their designated allotments to raze their homes.

Petitioners therefore seek a declaration of their rights to their allotment in, and designation as trust beneficiaries of, parcel 597-080-01, pursuant to 25 U.S.C. 345. They also seek to enjoin the Respondents from denying, and otherwise excluding the Petitioners from, their allotment in, and designation as trust beneficiaries of, parcel 597-080-01.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The Ninth Circuit decision in this case is in conflict with the decisions of the Eighth and Tenth Circuit courts of appeals, which hold that a federally recognized tribe is not a necessary and indispensable party to an action to enforce an individual Indian's allotment under 25 U.S.C. 345. *Antoine v. United States ("Antoine")*, 637 F.2d 1177, 1181-82 (8th Cir. 1981), *reaffirmed after remand*, 710 F.2d 477, 478; *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier ("Potawatomi")*,17 F.3d 1292, 1294 (10th Cir. 1994), *reaffirmed after remand*, 142 F.3d 1325, 1329.

Here, the Ninth Circuit decision erroneously holds that the subsequently recognized tribe, known as the Jamul Indian Village, is a necessary and indispensable party to the individual Indian Petitioners' action to enforce their allotments in non-tribal land, which they acquired when the land was deeded to the United States in trust for their individual benefit, three years before the tribe was established under 25 U.S.C. 476. App. 1a-4a.

Here, the Jamul Indian Village is not a necessary or indispensable party to Petitioners' action, because there is no evidence in the record that it ever claimed a "legally protected interest" in Parcel 597-080-01. See for e.g., *Yellowstone County v. Pease*, 96 F.3d 1169, 1172 (9th Cir. 1996); *Antoine v. United States*, 637 F.2d 1177, 1181-82 (8th Cir. 1981); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*,17 F.3d 1292, 1294 (10th Cir. 1994). As held by both the Ninth and Tenth Circuits, a "legally protected interest" excludes those "claimed" interests that are "patently frivolous." *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Davis v. United States* 192 F.3d 951, 958-59 (10th Cir. 1999).

Contrary to the Ninth Circuit's erroneous finding, App. 2a, the United States has already conceded that the Village has not "claimed jurisdiction over the parcel of land at issue in this action." The United States' response to Petitioners' FOIA request, contains a May 9, 2000 memo from Carmen Facio of the Pacific Regional office of the BIA to Nancy Pierskalla and George Skibine of the BIA in Washington, D.C., stating that the: "[c]urrent trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66

acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village."

However, even if the Ninth Circuit's finding was not erroneous, it would still conflict with the Eighth and Tenth Circuit decisions in which a tribe's claim to individual Indians' allotments does not make the tribe a necessary or indispensable party to an action to enforce the individual Indians' allotments pursuant to 25 U.S.C. 345. *Antoine v. United States*, 637 F.2d 1177, 1181-82 (8th Cir. 1981); *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994).

> This language [of 25 U.S.C. 345] is unequivocal. The United States, as the allotting agent, is the appropriate defendant in suits involving the right to an allotment. In our view, determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States. Furthermore, if it is determined that the United States wrongfully withheld a patent for an allotment, the government may be held liable for damages, regardless of the presence or absence of other potential parties. *Antoine*, 637 F.2d 1177, 1181.

The Ninth Circuit's decision also fails to acknowledge and distinguish the Tenth Circuit's decision in *Potawatomi*, 17 F.3d 1292, 1294. There, the Tenth Circuit reversed the district court's finding that

a "tribe" was necessary or indispensable to an action over trust allotments, because the "tribe" had no "protected interest" in the individual Shawnee Indians' trust applications.

There, as here, the Tenth Circuit found that the BIA had the power to grant trust allotments of land to individual Absentee-Shawnee Indians within the Potawatomi reservation, under 25 U.S.C. 465 and a May 23,1872 Act of Congress, ch. 206, 17 Stat. 159 (1872). The Potawatomis sued the BIA to prevent the grant of such trust allotments to the individual Absentee-Shawnee Indians. The Tenth Circuit reversed dismissal for failure to join the Absentee-Shawnee "tribe," finding that the United States had failed to show that the Absentee-Shawnee tribe had a "legally protected interest," since the Absentee-Shawnee tribe had never been granted an "undivided trust or restricted interest" in the land.

There, as here, the Tenth Circuit found that the alleged "interest" of the Absentee-Shawnee tribe was merely an expectation, just as the alleged "interest" of the Jamul Indian Village is merely an expectation that has not yet come to pass, and such expectations do not constitute a legally protected interest for purposes of necessary party analysis under Fed. R. Civ. P. 19. *Potawatomi*, 17 F.3d at 1294.

In *Potawatomi*, the BIA never transferred any trust or protected interest to the Absentee-Shawnee tribe, just as in this case, the BIA never transferred any trust or protected interest in Parcel 597-080-01 to the Jamul Indian Village, after the Petitioners became designated beneficiaries of the trust parcel. Therefore

the Tenth Circuit found that the "tribe" had no conflict with the designated individual Indian trust applications, and was not a necessary or indispensable party to the action.

> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land for purposes of 25 C.F.R. 151.8. It merely grants the Secretary of Interior the power to allot land to individual Absentee-Shawnee tribesmen. The Act does not mention any power to allot lands to the Absentee-Shawnee collectively as a tribe. Moreover, as the Potawatomi tribe correctly points out in its brief, this "interest" is merely an expectation of the Absentee-Shawnee tribe that the BIA will evaluate their applications as they would Potawatomi applications. This expectation is not a legally protected interest for purposes of 12(b)(7) necessary party analysis. ...
>
> In the absence of evidence showing the nature of the Absentee-Shawnee tribe's interest in Potawatomi land, the BIA failed to sustain its burden with respect to its motion under 12(b)(7). For this reason the district court abused its discretion in dismissing the action. *Potawatomi*, 17 F.3d 1292, 1294.

Here, there is a similar lack of evidence showing any protected interest of the Jamul Indian Village tribe

in Parcel 597-080-01. Just as the 1872 Act did not create any "undivided trust or restricted trust interest" in the Absentee-Shawnee tribe, the 1978 grant deed here did not, and could not, create any protected interest in a "tribe" that had yet to organize, had yet to adopt a constitution, had yet to be recognized, and had yet to exist in 1978. Moreover, there is no evidence that any protected interest in Parcel 597-080-01 was ever subsequently transferred to the Jamul Indian Village tribe. It therefore remains an abuse of discretion for the Ninth Circuit to have dismissed this action, where the BIA failed to make a Fed. R. Civ. P.12(b)(7) motion, let alone sustain its burden under Fed. R. Civ. P.19.

Similarly, here, until the BIA amends the grant deed to transfer the present designation of the individual Jamul Indian beneficiaries, to the subsequently recognized "tribe," the United States has failed to prove that the subsequently created "tribe" is either a necessary or indispensable party to this action.

The absence of any subsequently recorded transfer of the Petitioners' trust interest, also explains why the Ninth Circuit's reliance on its earlier decision in *Pit River Home and Agric. Coop. Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994), is erroneous. In *Pit River*, unlike here, there was a formal designation of the subsequently recognized "tribe" as the beneficiary of the grant deed, after the tribe was recognized. 30 F.3d at 1093. Here, the United States concedes in silence that there has been no such recorded transfer, amended grant deed, nor any formal designation of the Jamul Indian Village "tribe" as the beneficiary of the 1978 Daley grant deed, after the Village was recognized in 1981.

Here, there are no competing interests between the subsequently recognized "tribe" and the Petitioners who were designated individual trust beneficiaries, because the United States has conceded that the "tribe" did not exist when the Petitioners' designated interest was originally recorded in the 1978 deed, and there has been no subsequent transfer of any interest in the parcel to the tribe.

As was found in *Kansas v. Norton*, 249 F.3d 1213, 1226-27 (10th Cir. 2001):

> Thus, the absence of the Miami Tribe does not prevent the State from obtaining its requested relief or an adequate judgment. Nor do we believe the absence of the Tribe is likely to subject the parties to this action to multiple or inconsistent obligations..."

A "tribe" that did not exist in 1978 simply cannot be found to have acquired a "legally protected interest" in Parcel 597-080-01 when the grant deed was recorded in 1978, and any claim by the United States to the contrary is patently frivolous. *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999).

The United States has simply submitted no evidence that any amendment to the grant deed was ever recorded, transferring the individual Indian beneficiaries' designation to the subsequently created "tribe," after its recognition in 1981. Therefore, just as was found in *Potawatomi*:"In the absence of evidence showing the nature of the Absentee-Shawnee tribe's

interest in Potawatomi land, the BIA failed to sustain its burden with respect to its motion..." under Rule 19 here. Id., at 1294.

The Ninth Circuit's decision also conflicts with the Eighth and Tenth Circuits decisions by denying the Petitioners all rights and remedies pursuant to 25 U.S.C. 345, without any attempt to shape the equitable relief requested to avoid this prejudice. App. 3a. For example, the Eighth Circuit noted that a damages remedy could be shaped to avoid any potential infringement if any other non-party were found to be in possession of the allotment: "if it is determined that the United States wrongfully withheld a patent for an allotment, the government may be held liable for damages, regardless of the presence or absence of other potential parties." *Antoine*, 637 F.2d 1177, 1181.

"[T]he absence of an alternative forum [sh]ould weigh heavily, if not conclusively against dismissal." *Sac and Fox v. Norton*, 240 F.3d 1250, 1260 (10th Cir. 2001), citing, *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996). Even the Ninth Circuit has, on a prior occasion, conceded that courts should be "extra cautious" before dismissing an action pursuant to Rule 19, where "there does not appear to be any alternative forum in which plaintiffs' claims can be heard." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996).

Here, there was certainly no need to throw the baby out with the bath water and dismiss the Petitioners' entire action to protect any interest the United States perceives the tribe has in Parcel 597-080-01. Even if there had been a subsequent transfer of the

Petitioners' interest in the trust parcel to the tribe, as the Eighth Circuit held in *Antoine*, the Petitioners would remain equitably entitled to damages from the United States for the wrongful withholding of a patent for their original allotment in 1978, since such damages would not impair any subsequent interest the tribe allegedly acquired.

Ultimately in the remand of *Antoine*, the District Court awarded damages to prevent violation of the 5th Amendment's prohibition against the taking of private property without just compensation. The Eighth Circuit then affirmed the award of damages for the value of the allotment taken, plus an amount sufficient "to produce the present full equivalent of that value paid contemporaneously with the taking." *Antoine v. United States (II)*, 710 F.2d 477, 479-80 (8th Cir. 1983), citing this Court's opinion in *United States v. Creek Nation*, 295 U.S. 103, 111 (1935), and citing *Confederated Salish and Kootenai Tribes v. United States*, 401 F.2d 785 (Ct. Cl. 1968), *cert. denied*, 393 U.S. 1055 (1969), and *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 (1938).

Individual Indians in the Ninth Circuit, including the Petitioners, should not be denied just compensation or any of the remedies provided by 25 U.S.C. 345 in the other circuits, just because their tribe was subsequently recognized after the United States acquired land in trust for their individual benefit in California, instead of the Dakotas.

II. CONCLUSION

The decision of the Ninth Circuit Court of Appeals conflicts with the Eighth and Tenth Circuit courts of appeals. As the Eighth and Tenth Circuits have held, a federally recognized Indian tribe is not, and should not be, a necessary and indispensable party to an action to enforce individual Indians' allotments under 25 U.S.C. 345.

More importantly, a false claim of sovereignty by a subsequently created I.R.A. tribe, should not be allowed to deprive individual Indians of all remedies provided by 25 U.S.C. 345.

As Felix Cohen, IBIA Chairman under President Roosevelt, and the primary draftsman of the Indian Reorganization Act, warned in 1953:

> "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith..." Cohen, Handbook of Federal Indian Law (DOI 1982) p. v.

Particularly in these times of great challenge to our distinctly American freedoms, the United States should not allow false claims of tribal sovereignty to take individual Indians' allotments without just compensation, lest our democratic faith fail these indigenous Americans.

For all of the foregoing reasons, since the "threshold requirements of Rule 19(a) have not been satisfied," as this Court decided in its *per curiam* opinion, *Temple v. Synthes Corporation, Ltd.*, 498 U.S. 5, 8 (1990), the writ of certiorari should be granted, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the Petitioners' action should be remanded for trial.

Respectfully submitted

Patrick D. Webb
Counsel of Record
Webb & Carey
401 B Street, Ste. 306
San Diego, Cal. 92101
(619) 236-1650 Tel
(619) 236-1283 Fax
Attorneys for Petitioners

(Any footnotes trail end of each document)

No. 02-55800

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES; et al.,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; et al.,
Defendants - Appellees.

July 8, 2003, Argued and Submitted,
Pasadena, California
August 11, 2003, Filed

COUNSEL: For WALTER ROSALES, MARIE TOGGERY, KAREN TOGGERY, Plaintiffs - Appellants: Patrick D. Webb, Esq., WEBB & CAREY, San Diego, CA.

For UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, NATIONAL INDIAN GAMING COMMISSION, Defendants - Appellees: M. Alice Thurston, Esq., Mark R. Haag, Esq., Katherine J. Barton, Esq., U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For UNITED STATES OF AMERICA, Defendant - Appellee: Appellate Section, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

For UNITED STATES OF AMERICA, U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, NATIONAL INDIAN GAMING COMMISSION, Defendants - Appellees: Robert H. Plaxico, AUSA, Peter John Sholl, Esq., USSD - OFFICE OF THE U.S. ATTORNEY, San Diego, CA.

JUDGES: Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

OPINION: MEMORANDUM *

Plaintiffs-Appellants Walter Rosales et al., appeal from an order of the district court granting the United States' motion for summary judgment and dismissing their claims. Because we find that the Jamul Indian Village (the "Village") is a necessary and indispensable party pursuant to Fed. R. Civ. P. 19, we affirm the district court's order dismissing this action. Although the district court did not address whether the Village was a necessary and indispensable party, we have authority to address the issue on appeal. *See Pit River Home and Agric. Coop. Assoc. v. United States*, 30 F.3d 1088, 1099 (9th Cir. 1994).

The Village is a necessary party pursuant to Rule 19(a)(2)(i), which provides that an absent party is necessary if "the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect that interest[.]" Fed. R. Civ. P. 19(a)(2)(i). The Village has claimed jurisdiction over the parcel of land at issue in this action since at least 1981.

This interest would be impaired if Appellants were declared to be the beneficial owners of the land.

The Village enjoys sovereign immunity from suit and cannot be forced to join this action without its consent. *See Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999). Furthermore, the United States is not an adequate representative of the Village's interests in this action because the United States cannot adequately represent the interests of one tribe in an intertribal dispute. *See Pit River*, 30 F.3d at 1101.

The Village is also an indispensable party pursuant to Rule 19(b), which requires the court to examine the following factors in order to determine whether this action should be dismissed: (1) prejudice to the absent party or those already parties; (2) the extent to which relief could be shaped to avoid prejudice; (3) adequacy of the judgment rendered without the absent party; and (4) whether plaintiff has another adequate remedy. *See* Fed. R. Civ. P. 19(b). The Village would be prejudiced if Appellants were granted beneficial ownership of the parcel of land, and relief cannot be shaped to avoid this prejudice. While Appellants do not appear to have another adequate remedy, "the tribe's interest in maintaining [its] sovereign immunity outweighs the plaintiffs' interest in litigating their claims." *See American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002) (citations omitted). For these reasons, the Village is a necessary and indispensable party, without whom this action cannot proceed.

AFFIRMED.

Footnotes

* This disposition is not appropriate for publication and may not be cited to by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

CASE NO. 01-951-IEG (JAH)

UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF CALIFORNIA

WALTER ROSALES, MARIE TOGGERY, and KAREN TOGGERY,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER (1) CONSTRUING PLAINTIFFS' MOTION FOR A NEW TRIAL AS A MORTION FOR RECONSIDERATION; and (2) DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

[Doc. No. 37]

Presently before the Court is plaintiffs Walter Rosales, Marie Toggery, and Karen Toggery's ("plaintiffs") motion for new trial and relief from judgment. For the reasons discussed below, the Court construes plaintiffs' motion as a motion for reconsideration and denies plaintiffs' motion.

BACKGROUND

On May 30, 2001, plaintiffs Walter Rosales Marie Toggery, and Karen Toggery ("plaintiffs") filed a complaint far declaratory and injunctive relief pursuant to the Indian Reorganization Act of 1934. In their complaint, plaintiffs seek (1) a declaration of their

entitlement to the allotment of parcel number 597-080-01; (2) to compel defendants to issue to plaintiffs a trust patent for the above-mentioned parcel; (3) to enjoin defendants from further denying plaintiffs' entitlement to the parcel; (4) money damages for deprivation of the use and benefit of their parcel; and (5) reasonable attorneys' fees, costs, and expenses. In their complaint, plaintiffs allege that on February 5, 2001, the United States took action, and first published notice, denying plaintiffs' entitlement and excluding them from their allotment of land in parcel 597-08001." (Compl. at 6 ¶ 18.) This notice, attached to defendants' motion as Exhibit A, was issued by the Bureau of Indian Land Affairs pursuant to 25 C.F.R. §§ 151.10 and 151.11 and invited the public to comment on the pending application by the Jamul Indian Village Reservation for the United States to take certain parcels into trust for the benefit of the Reservation. The pending application does not include the parcel to which plaintiffs claim allotment rights, but plaintiffs allege that the publication of the notice apprised them of the government's failure to issue a patent to plaintiffs for an allotment to parcel 597-080-01. The leadership of the Jamul Reservation has been pursuing the trust application in an effort to commence gaming activities on tribal land. However, plaintiffs contend that they do not challenge the pending application for trust status of the potential gaming property but rather the government's failure to issue a patent to plaintiffs for an allotment on a separate piece of land, parcel 597-080-01.

On August 10, 2001, defendants filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 4(i), 8(a), 12(b)(2), and 12(b)(6), for failure to comply

with minimum federal pleading requirements, lack of personal jurisdiction, insufficient service of process, and failure to state a claim upon which relief may be granted. In their motion to dismiss, defendants also contended that the Doe defendants named by plaintiffs in their complaint were improper and should be dismissed. Plaintiffs filed an opposition to the motion on October 1, 2001. Defendants filed their reply on October 15, 2001. In their reply, defendants withdrew the portion of their motion to dismiss based on lack of personal jurisdiction and insufficient service of process under Rules 4(i), 12(b)(2), and 12(b)(5), in light of the additional information regarding service of the summons and complaint that plaintiffs attached to their opposition to defendants' motion. On October 16, 2001, the Court denied defendants' motion.

On November 9, 2001, defendants filed a motion to dismiss or, in the alternative, for judgment on the pleadings or summary judgment. In their motion, defendants contended that they were entitled to dismissal, judgment on the pleadings, or summary judgment on the basis that (1) the case is not ripe for adjudication; (2) plaintiffs lack standing; and (3) plaintiffs have not exhausted their administrative remedies. Defendants further contended in their motion that plaintiffs cannot claim allotment rights to parcel number 597-080-01 because this form of ownership was abolished in 1934. Finally, defendants argued in their motion that defendant National Indian Gaming Commission ("NIGC") is also entitled to dismissal, judgment on the pleadings or summary judgment because it does not play a role in determining whether land should be acquired by the United States in trust. In their opposition, plaintiffs contended that defendants

mischaracterized the nature of their claims. Plaintiffs emphasized that they are not challenging the application for trust status currently pending before the Bureau of Indian Affairs. Rather, plaintiffs argued that the gravamen of their complaint is that the government failed to issue them a patent for an allotment to parcel number 597-080-01, which was conveyed to the United States in trust in 1978. In support of plaintiffs' claim to this allotment, plaintiffs attached to their complaint the 1978 deed by which parcel number 597-080-01 was conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." (See Compl., Ex. B.)

In its order of February 14, 2002, the Court granted defendants' motion for summary judgment on the basis that plaintiffs had no individual rights to an allotment in parcel number 597080-01 because the deed to the United States provided that the United States would hold the land in trust for "such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." The Court found that this language referred to the Jamul tribe rather than to the half-blooded Jamul Indians then residing on the parcel. (See Summary Judgment Order at 13.) Thus, plaintiffs could not claim rights to land that was deeded in trust for the Jamul tribe as a whole. Rather, the Court found that plaintiffs' rights in parcel 597-080-01 were derivative of those of the tribe and that plaintiffs must pursue these rights through tribal government mechanisms. (See id. at 13-15.)

On February 22, 2002, plaintiffs filed the instant "motion for new trial and relief from judgment."

Defendants filed an opposition on March 25, 2002, and plaintiffs filed their reply on April 2, 2002. On April 8, 2002, the Court heard oral argument on plaintiffs' motion. The Court now turns to the merits of the motion.

DISCUSSION

I. Legal Standard for Motion for Reconsideration

A party may file a Rule 59(e) motion following a summary judgment order because it is considered a "judgment" within the meaning of Rule 54(a). See Fed. R. Civ. P. 54(a) (noting that a "judgment" includes "a decree and any order from which an appeal lies"). A notion to reconsider brought a s motion to amend or alter the judgment pursuant to Federal Rule of Civil Procedure 59(e) is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an "intervening change in controlling law." School Dist. No. IJ, Multnomah County v. AC and S, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

A Rule 59(e) motion, however, should not be used to relitigate old matters, raise new arguments, or present evidence that could have been raised prior to the court's entry of judgment. See Brown v. Wright, ht, 585 F.2d 708, 710 (9th Cir. 1978) (holding that a motion to amend is not to be used "to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits."); Simon v. United States, 891 F.2d 1154, 1159 (5th Cir. 1990) ("These [Rule 59]

motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory."); Savers Federal Sav. & Loan Ass'n v. Reetz, 888 F. 2d 1497, 1508-09 (5th Cir. 1989) (finding no abuse in denying a Rule 59(e) motion seeking to raise new reasons that summary judgment was inappropriate); Morales v. Quintiles Transnational Corp., 25 F. Supp. 2d 369, 372 (S.D.N.Y. 1998) (holding that a motion for reconsideration under Rule 59(e) "is not a substitute for appeal and 'may be granted only where the Court has overlooked matters or controlling decisions which might have materially influenced the earlier decision.") (citations omitted) (emphasis added).

In their moving papers, plaintiffs cite the standard for a new trial under Rule 59(a). However, a plain reading a Rule 59(a) indicates that it is not applicable. Rather, Rule 59(a) applies (1) "in an action in which there has been a trial by jury;" or (2) "in an action tried without a jury." Furthermore, the cases cited by plaintiffs in their discussion of the appropriate legal standard each involve motions brought subsequent to trial. In the instant case, there has not been a trial. Rather, plaintiffs seek reconsideration of the Court's order granting defendants' motion for summary judgment. Thus, the Court construes plaintiffs' motion as a motion for reconsideration brought under Rule 59(e). Applying the standard for Rule 59(e) motions, plaintiffs do not cite to any newly discovered evidence or "intervening change[s] in controlling law." See School Dist. No. IJ, Multnomah County AC and Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Rather, plaintiffs' arguments for reconsideration appear to be that the Court committed clear error or that its decision was manifestly unjust.

See id. Thus, the Court applies this standard to plaintiffs' motion.

II. Analysis of Plaintiffs' Arguments for Reconsideration

A. Trust Patent Sought by Plaintiffs

Plaintiffs' first argument for reconsideration is that the Court misapprehended the form of relief sought by plaintiffs. Plaintiffs emphasize the Court's statement in the summary judgment order that "[i]t is unclear from plaintiffs' complaint and briefs whether they seek to compel the government to issue a fee patent or a trust patent." (See Summary Judgment Order at 13 n.3.) In the instant motion, plaintiffs emphasize that they "do not seek to hold fee simple title," but "merely wish to enforce their rights to have the Government hold title in trust for the express benefit of 'Jamul Indians of one-half degree or more Indian blood,' who were residing on the property in 1978 when the Government[ ] accepted the Daley grant deed." (See Pls.' Mem. P. & A. at 5.)

However, the Court found in its order granting defendants' motion far summary judgment that "[r]egardless of whether plaintiffs seek to compel the issuance of a fee or trust patent, it is clear that plaintiffs' claim fails on either basis in light of the 1978 deed's language designating the Tribe, rather than the individual plaintiffs, as the beneficiaries of parcel number 597-080-01." (See Summary Judgment Order at 13 n.) Thus, as the Court found in its previous order, plaintiffs are not entitled to any rights in parcel 597-080-01 independently of their rights as tribe members.fn1

B. Plaintiffs' Rights as a "Dependent Indian Community" Residing on Parcel Number 597-080-01

Plaintiffs also object to the Court's characterization of their claim as one seeking to enforce their individual rights in the parcel. Rather, plaintiffs contend that they are tenants in common with the other half-blooded Jamul Indians residing on the parcel when the United States took it into trust in 1975. Plaintiffs contend that they were members of a "dependent Indian community" for which the government accepted parcel number 597-080-01 into trust in 1978. In support of this proposition, plaintiffs cite to Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998) and United-States v McGowan, 302 U.S. 535 (1938). This "dependent Indian community," plaintiffs argue, was not a tribe in 1978 when the deed was executed; thus, the land could not have been accepted into trust for the benefit of the "tribe." Plaintiffs argue that the acceptance of the deed into trust did not "designate the tribe" and that the tribe could not have been recognized as such in 1975 because the Secretary did not approve its constitution until July 7, 1981.

Plaintiffs' use of the term "dependent Indian community" in this context is misplaced, however, as the term is relevant to federal criminal and civil jurisdiction over Indian lands, rather than forms of Indian ownership of land. See, e.g., Alaska v. Native Village of Venetie, 522 U.S. 520, 527 (1998) (holding that under 18 U.S.C. § 1151, "dependent Indian communities" refer to Indian lands that are neither reservations nor allotments but are subject to federal jurisdiction). Furthermore, Ninth Circuit case law indicates that the Secretary of the Interior uses

language such as that found in the 1975 deed to refer to tribes that have yet to be formed. For example, in Pit River Home and Agric. Coop. Ass'n v. United State, the Secretary of the Interior interpreted the language, "in trust for such Bands of the Pit River Indian of the State of California as shall be designated by the Secretary of the Interior" to mean that "the whole Pit River Indian Tribe or Nation when it has organized to include all elements of the Pit River Indians and has received Secretarial approval of the constitution adopted for this purpose should be designated the beneficial owner of the XL Ranch." 30 F.3d 1085, 1092-93 (9th Cir. 1994). Significantly, the Secretary did not interpret the above language to designate as beneficiaries only the bands of Pit River Indians then residing on the land.

Thus, applying the Secretary's interpretation of similar language from Pit River, it is clear that the 1975 deed's language designating as beneficiaries "such Jamul Indians of one-half degree or more blood as the Secretary of the Interior may designate" indicates the Secretary's intent to accept parcel number 597-080-01 into trust for the Jamul Tribe upon its recognition, rather than for the individuals, or the "dependent Indian community" then residing on the land. (See Compl., Ex. B.) As the Court found in its order granting defendants' notion for summary judgment, the Secretary's intent is further illustrated by the 1975 letter from the United States Department of the Interior, attached to defendants' reply as Exhibit L, which notes that, as of March 15, 1978, the Department of the Interior "ha[d] received eleven signatures out of the thirteen ½ bloods for the Bureau of Indian Affairs to proceed with the proposed acquisition through a

donation to establish the Jamul Indian Reservation." (See Summary Judgment Order at 14 (citing Defs.' Ex. L).) Thus, plaintiffs' argument that the Court erred by failing to recognize the "dependent Indian community" comprised of the Jamul Indians residing on parcel 597-080-01 as the beneficiaries of the 1978 trust deed lacks merit.

C. Genuine Issue of Material Fact as to whether There Was a Recognized Tribe When the United States Accepted Parcel Number 597-080-01 into Trust in 1978

Finally, plaintiffs argue that there is a genuine issue of material fact as to whether the Secretary of the Interior had recognized the Jamul Tribe when the United States accepted parcel number 597-080-01 into trust in 1978. Plaintiffs cite to Native Village of Tyonek v. Puckett, 957 F.2d 631, 634-35 (9th Cir. 1992) for the proposition that the Court is required to make express factual findings to determine that a Jamul tribe existed in 1975. However, Puckett involved the issue of "whether any Alaskan native village constitutes an Indian tribe for the purpose of sovereign immunity." 1d. at 635. Furthermore, the Court need not determine whether there is a Jamul Tribe; it need only find, as it did in the summary judgment order, that there is no genuine issue of material fact that the 1978 deed did not grant plaintiffs any rights in parcel 597-080-01 other than as members of the anticipated Jamul Tribe.

Plaintiffs' argument that the Court must make specific factual findings as to whether a tribe existed in 1978 is misplaced, as the deed language conveyed the parcel in trust for the anticipated Jamul Tribe. Plaintiffs cite to no authority showing that the United States is

unauthorized to accept land into trust for a tribe prior to its formal recognition by the Secretary of the Interior. Plaintiffs do not dispute that upon the Secretary's approval of the Jamul Tribe's constitution in 1981, the Jamul Indians became a "tribe." Thus, plaintiffs' argument requires the Court to find that the Secretary is prohibited from conveying land in trust to a tribe prior to its formal recognition by the Secretary of the Interior. The Court is aware of no authority for such a proposition. To the contrary, the Secretary of the Interior has specifically concluded that conveyances into trust for tribes that have yet to be designated are effective transfers intended to benefit the tribe as a whole upon its recognition.fn2 See, e.g., Pit River, 30 F.3d at 1092-93. Thus, the Court finds no clear error or manifest justice in its determination that the language of the 1975 deed conveying parcel number 597-080-01 into trust for "such Jamul Indians of one-half degree or more blood as the Secretary of the Interior may designate" refers to the Jamul Tribe rather than the individual Jamul Indians then residing on the parcel.fn3

CONCLUSION

For the foregoing reasons, the Court construes plaintiffs' "motion for a new trial" as a Rule 59(e) motion for reconsideration. The Court further finds that plaintiffs have failed to show that the Court's order granting defendants' motion for summary judgment contained "clear error" or was "manifestly unjust." The Court finds no other basis for reconsideration. Thus, the Court DENIES plaintiffs' motion for reconsideration.

IT IS SO ORDERED.

IRMA E. GONZALEZ
United States District Judge

Dated: 4/22/02

cc: Magistrate Judge Houston
all parties

Footnotes

fn1 Plaintiffs also argue in their reply that there is no requirement that individual Indians for whom the United States accepts land into trust must be members of a tribe. Pls.' Reply at 6.) However, the Court acknowledged that under section 465, land could be taken into trust for individual Indians. (See Summary Judgment Order at 10.) The Court determined defendants were entitled to summary judgment on the basis that the 1975 conclusively established that the United States did not take the parcel into trust for individual Indians but for the anticipated Jamul Tribe as a whole. (See id. at 12-14.)

fn2 The government also emphasizes that under 5 U.S.C. § 476, an Indian group could organize and adopt a constitution only if the group is an "Indian tribe" -- defined under section 479 as "the Indians residing on one reservation" or under section 479a(2) as any "tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." See 25 U.S.C. §§ 476, 479. Thus, the government contends, parcel number 597-480-01 was part of the "reservation" prior to 1951 because the Jamul Indian could have their constitution approved by the Secretary only if they were residing on a

"reservation" as a tribe. This argument forms an alternative basis for the Court's finding that plaintiffs have no rights in parcel number 597-080-01 other than through normal tribal government mechanisms. See F. Cohen, Handbook of Federal Indian Law, at 472 (1982 ed.) ("The manner in which a tribe chooses to use its property can be controlled by individual tribe members only to the extent that the members participate in the governmental processes of the tribe.").

fn3 The Court also rejects plaintiffs' suggestion that the Secretary was required to "initiate designation proceedings" subsequent to its acceptance of parcel number 597-084-41 into trust. Courts have recognized under similar circumstances that "it [is] not necessary that the designation be made by a formal proclamation." Coast-Indian Cmty v. United States, 550 F. 2d 639, 643 (Ct. I. 1977). Rather, "designation may be inferred by law." Id. at 644. Here, the Court finds that the Secretary's recognition of the Jamul Tribe's constitution in 1981 accomplished such designation in light of the intent reflected in the 1978 deed.

NOT FOR PUBLICATION

No. 02-55800

D.C. No. CV-01-00951-IEG
Southern District of California,
San Diego

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER ROSALES; MARIE TOGGERY;
KAREN TOGGERY,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; U.S.
DEPARTMENT OF THE INTERIOR; BUREAU
OF INDIAN AFFAIRS; NATIONAL INDIAN
GAMING COMMISSION,
Defendants-Appellees.

Filed: September 19, 2003

ORDER

Before: SILVERMAN, W. FLETCHER, and RALWINSON, Circuit Judges.

Appellants' Petition for Rehearing filed on August 27, 2003, is DENIED.

U.S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

25 U.S.C. 345. Actions for allotments

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court [district court] of the United States; and said circuit courts [district courts] are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now [Aug. 15, 1894] held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

Fed. R. Civ. P., Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial

to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.